93-840

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOWARD L. SCOTT,

Petitioner

v.

AVON PRODUCTS, INC., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a United States Court of Appeals has jurisdiction pursuant to Title 28 §1291, U.S.C. to review on the merits massive misconduct by attorneys where a suspended attorney by the Disciplinary Board of the Supreme Court of Pennsylvania is used by respondents' attorneys to entice favorable final decisions as to each respondent through fraud and conspiracy on the district court below.

II. Whether United States Court of Appeals may dismiss an Appeal for lack of jurisdiction on the merits without first having permitted appellant to file his Brief and Appendix as provided for under Federal Rules of Appellate Procedure.

CORPORATE DISCLOSURE

THERE ARE NO PARENT COMPANIES, SUBSIDIARIES OR AFFILIATES ASSOCIATED WITH THE PETITIONER.

PARTIES TO THIS PROCEEDING

List of Plaintiffs-Appellants:

THE FABALON COMPANY, INC.
FABALON LABORATORIES, INC.
FABALON, INC.
FIRST FOUNDATION
HOWARD L. SCOTT
KAREN & WENDY SCOTT TRUST
CHARLES L. WRAGG, JR.
BEVERLY L. WRAGG

List of Respondents:

AVON PRODUCTS, INC.
UNITED GUARDIAN, INC.
FREEMAN INDUSTRIES, INC.
MARUBENI AMERICA CORPORATION
GIORGIO OF BEVERLY HILLS
MACSIL, INC.

28 U.S.C. §2403(a) may be applicable in this case

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No.____

IN THE

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Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDERS FROM THE COURTS BELOW

ORDER by the United States Court of Appeals for the Third Circuit to dismiss the appeal for lack of jurisdiction of the merits and dated April 28, 1993, p. A-4 app. ORDER by the United States Court of Appeals denying petition for rehearing, dated May 28, 1993, p. A-2 app. ORDER by the United States District Court for the Eastern District of Pennsylvania to dismiss respondent Marubeni, dated March 8, 1992, p. A-8, app. ORDER, District Court to dismiss United Guardian and Freeman Industries, dated June 15, 1992, p. A-9, app. ORDER, District Court granting summary judgment to Avon Products, Giorgio of Beverly Hills and Macsil, dated July 7, 1992, p. A-12, app. ORDER this Court for extension to Oct. 25, 1993, p. A-1, app.

JURISDICTION

Jurisdiction in the U. S. Court of Appeals is founded pursuant to Title 28, §1291 U.S.C. and in the U.S. District Court under Sections 1338, 1332 and 1331, Title 28, U.S.C. This Court's Jurisdiction is invoked under Title 28, §1254(1). U.S.C.

STATUTORY PROVISIONS INVOLVED

Section 1291, Title 28, U.S.C is set forth in the Appendix at page A-5 for review of Final Decisions of District Courts.

Rule 12(b), Federal Rules of Appellate Procedure for notification of Briefing and Scheduling. App. p. A-26.

STATEMENT OF THE CASE

Declaration of Howard L. Scott who stands before this honrorable court pro se. Now Howard L. Scott here do declare and swear and subject to all the penalties for perjury under Title 28, U.S.C. §1746 that each and every averment made herein is true.

AS TO RESPONDENT MARUBENI: At page A-8 in the Appendix there is a district court's ORDER. This ORDER is a fraud. The order dismisses Marubeni since the court believes there is a settlement. No such settlement was ever reached. Gregory H. Wheeler who was attorney for plaintiffs got together with Marubeni's attorney and appeared before the court and both fraudulently told the court a settlement had been made with Marubeni in order to get the court to dismiss Marubeni. No such settlement exist even today. It is important to note that Gregory H. Wheeler at this time had been recommended suspended, since suspended, by the Disciplinary Board of the Supreme Court of Pennsylvania. See the Disciplinary Board's Report on Mr. Wheeler at page A-13, Appendix.

AS TO RESPONDENTS UNITED GUARDIAN AND FREEMAN INDUSTRIES: The ORDER at page A-9, app to dismiss United and Freeman is a fraud on

the district court. Vernita C. Williams, Esq. by the district court's ORDER at page A-7, app, is attorney for plaintiffs. But the suspended Gregory H. Wheeler in the Transcript, page A-21, app, appeared with attorneys for United and Freeman and lied to the court that plaintiffs would not sign a settlement agreement and thereby getting the court to dismiss United and Freeman. It was agreed that once the settlemant agreement was completed that it would be signed on the campus of Widener University, page A-28, app. No such settlement agreement was completed for signature by attorneys. The ORDER at page A-9, app, is a conspiracy and fraud on the Court by the suspended Gregory H. Wheeler and attorneys for respondents United and Freeman.

AS TO RESPONDENT MACSIL: The suspended Gregory H. Wheeler granting judgment to Macsil at page A-20, lines 5 to 15 in the Transcript is a clear fraud and conspiracy on the Court by both Mr. Wheeler and attorney for Macsil. The Court said in the Transcript at page A-17, line 18, app, that plaintiffs' attorney Vernita C. Williams, Esq. that he had spoken to plaintiffs attorney and she would not be present. Gregory H. Wheeler represented no one. The ORDER granting summary judgment to Macsil is a clear fraud and conspiracy by Mr. Wheeler and attorney for Macsil on the court. ORDER is located at page A-12, app.

AS TO RESPONDENT GIORGIO: At page A-20, line 36. app, in the Transcript Mr. Wheeler lied to the court that he was granting judgment to Giorgio. Mr. Wheeler was not counsel for anyone. The ORDER at page A-12, in the appendix granting summary judgment to Giorgio is a fraud on the court.

AS TO RESPONDENT AVON: It is highly important to note that all respondents filed memoranda before the district court to force plaintiffs to retain the suspended Gregory H. Wheeler. See respondent's memorandum at page A-25 in the Appendix. So in affect, Gregory H. Wheeler was attorney for respondents. A conspiracy and fraud on the district court by Mr.

Wheeler and attorney for Avon resulted in the ORDER at page A-12, app, granting summary judgment to Avon.

AS TO WHETHER APPELLANT HAVE A RIGHT TO FILE HIS BRIEF AND APPENDIX ON APPEAL:

Rule 12(b), Federal Rules of Appellate Procedure provide that notification shall be on the filing of record on appeal and thereby giving Briefing and Scheduling Orders. The Court of Appeals below at page A-4, app, shows the petitioner in his appeal No. 92-2115 received "No Briefing and Schedule." It is an error for a Court of Appeals not to establish Briefing and Scheduling Orders on timely filed appeals.

The United States Court of Appeals pursuant to Section 1291, Title 28, U.S.C. have full authority to review final decision of the district court where fraud and conspiracy on that court is involved as to each respondent.

This court should grant certiorari here to explicitly rule that United States Court of Appeals pursuant to §1291, Title 28, U.S.C. have jurisdiction to rule on the merits of attorney misconduct and that timely filed appeals in a United States Court of Appeals should be entitled to Briefing & Scheduling Orders as provided by Rule 12(b), Federal Rules of Appellate Procedure.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the ORDERS of the Courts below and the associated attorneys misconduct thereto, and or to issue any other such orders this court considers necessary.

Respectfully submitted,

Howard L. Scott, Petitioner
P. O. Box 938, Crozer Mills
Enterprise Center
Upland, Pennsylvania 19015-0938
Tel: 215 877-6901

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Supreme Court of the United States

No. A-161

HOWARD SCOTT,

Petitioner

v.

AVON PRODUCTS, INC., et al.

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is nereby, extended to and including October 25th, 1993.

/s/ David H. Souter
Associate Justice of the Supreme Court of the United States

Dated this 18th
day of August, 1993.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2115

THE FABALON COMPANY, INC., et al.
HOWARD L. SCOTT,

Appellant

vs.

AVON PRODUCTS, INC., et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: May 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 10, 1993
#C-91

Nos. 92-2090, 92-2115

THE FABALON COMPANY, INC., et al.

v.

AVON PRODUCTS, INC., et al.
The Fabalon Company, Inc., et al, Appellants in 92-2090
Howard L. Scott, Appellant in 92-2115
(E.D. of Pa. Civil No. 91-05015 (JTG))

Present: MANSMANN, COWEN and ROTH,
Circuit Judges.

1. Clerk's submission for possible dismissal due to a jurisdictional defect.
2. Motion by Appellees Avon Products, Inc. and Giorgio of Beverly Hills in 92-2090 to dismiss the appeal for lack of jurisdiction, *and* for sanctions against Appellants and Counsel for Appellants for filing a frivolous appeal, *and* for just damages, including, but not limited to attorneys' fees and double costs pursuant to FRAP 38.
3. Motion by Appellees Avon Products, Inc. and Giorgio of Beverly Hills in 92-2115 to dismiss the appeal for lack of jurisdiction, *and* for sanctions.
4. Motion by Appellees United Guardian, Inc., Freeman Industries, Inc., and Marubeni America Corporation in 92-2115 to dismiss the appeal *and* for sanctions.
5. Motion by Appellants in 92-2090 to vacate the Clerk's Order of 2/24/93 allowing the Appellees to file their briefs within ten (10) days of the date of the order referring the jurisdictional issue to the

merits panel, and to maintain the Briefing *and* Scheduling Order of 1/6/93.

Deputy Clerk 597-1092

No Briefing Schedule established in Pro Se Appeal at *92-2115.*

ORDER

The foregoing motions are decided as follows:

1. The appeals are dismissed for lack of jurisdiction of the merits and for mootness of any remaining issue regarding removal of an attorney from a closed case.

2-3-4. These motions by appellees for dismissal *and* sanctions are granted insofar as they seek dismissal and denied insofar as they seek sanctions.

5. The motion by appellants to vacate is denied as moot.

By the Court,

/s/ Carol Los Mansmann

Circuit Judge

Dated: APR 28 1993

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

HISTORICAL AND STATUTORY NOTES

1982 Amendment

Pub.L. 97-164 provided that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Effective Date of 1982 Amendment

Amendment by Pub.L. 97-164 effective Oct. 1, 1982, see section 402 of Pub.L. 97-164, set out as a note under section 171 of this title.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 3831 and 3841 to 3843 of Title 22, Foreign Relations and Intercourse.

Legislative History

For Legislative history and purpose of Pub.L. 97-164, see 1982 U.S. Code Cong. and Adm. News, p. 11.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC. et al	:	CIVIL ACTION NO.
v.	:	
AVON PRODUCTS, INC., et al	:	91-CV-5015

ORDER

AND NOW, this 29th day of May, 1992, the Entry of Appearance Pro Hoc Vice of Vernita C. Williams, Esquire, for the purpose of this action only pursuant to Local Rule 13 is confirmed. Entry is on behalf of plaintiff.

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC. et al	:	CIVIL ACTION NO.
v.	:	
AVON PRODUCTS, INC., et al	:	91-CV-5015

ORDER

AND NOW, this 2nd day of April, 1992, it is hereby ORDERED that plaintiff's complaint is DISMISSED as to defendant Marubeni America Corporation, with whom plaintiff has reached a settlement.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, COMPANY, INC.	:	CIVIL ACTION
v.	:	
AVON PRODUCTS, INC.	:	NO. 91-5015

ORDER

AND NOW, this 13th day of July, 1992, it is hereby ORDERED that (1) paragraph two of this court's order dated July 7, 1992, is VACATED, (2) the motions to dismiss (docketed as Nos. 71 and 72) filed by defendants United Guardian, Inc. ("United Guardian") and Freeman Industries, Inc. ("Freeman") are GRANTED, and (3) defendants United Guardian and Freeman are DISMISSED, for the reasons which follow:

1. The court initially granted United Guardian's motion to dismiss for lack of personal jurisdiction in an order dated November 7, 1991. That order was vacated in an order dated March 10, 1992, in which the court also denied Freeman's motion to dismiss for lack of personal jurisdiction. The order to vacate was entered based upon the parties' representation that they were close to settling their dispute. Defendants consented to the jurisdiction of this court solely for the purpose of effecting a binding settlement agreement.

2. As time passed, however, the settlement process bogged down, due primarily to plaintiffs' unwillingness to finalize settlement. At a conference held on April 22, 1992, the court ordered that defendants re-file their motions to dismiss, which they did on May 4, 1992. Soon thereafter new counsel made an appearance for plaintiffs, causing some delay. Plaintiffs did not file responses to defendants' motions to dismiss until June 24, 1992.

3. In the conference held on June 29, 1992, plaintiff's (original) counsel once again referred to the earlier-proposed settlement with defendants. The court stated

that it would give the parties two days, until July 1, 1992, to finalize the settlement, or that, "[o]therwise, judgment will be entered in favor of the defendants as a sanction" against plaintiffs, who had failed to cooperate in settlement negotiations. Transcript at 8. The court issued a subsequent memorandum and order on July 7, 1992. In that order the court gave plaintiffs the benefit of the doubt and presumed that they had reached a settlement as ordered in the June 29 conference. The court accordingly dismissed United Guardian and Freeman and retained jurisdiction to enforce the terms of the settlement.

4. Defense counsel have now reported, in a letter dated July 7, 1992, that, as of that date, plaintiffs had made no effort to contact them to consummate the proposed settlement. As of this date plaintiffs have not responded to said letter. While the court is fully empowered to impose the sanction referred to in the June 29 conference, such a sanction is unnecessary in light of the pending motions to dismiss filed by United Guardian and Freeman. Upon review, the court has determined that these motions should be granted and that defendants should be dismissed for lack of personal jurisdiction.

5. This court incorporates by reference the order dated November 7, 1991, in which it granted United Guardian's first motion to dismiss for lack of personal jurisdiction. Plaintiff's response to the (second) motion to dismiss adds nothing new to the analysis. As stated in the November 7 order, plaintiffs have provided no evidence that United Guardian's Pennsylvania contacts are of a "continuous and substantial" nature such that this court could exercise general jurisdiction over United Guardian. *Provident National Bank v. California Federal Savings & Loan Association,* 819 F.2d 434, 437 (3d Cir. 1987).

6. Nor is there any evidence that United Guardian has subjected itself to this court's specific jurisdiction by

"purposefully avail[ing] itself of the privilege of conducting activities within [Pennsylvania], thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). The complaint alleges, at most, that United Guardian sold perfluorocarbon resins to Avon for use in Avon Banishing Cream and sold Lubraslide, containing the same resins, to Freeman Industries. However, there is no evidence whatsoever that such sales occurred in Pennsylvania, nor that United Guardian specifically intended that Avon Banishing Cream or Lubraslide be sold in Pennsylvania.

7. Nor is Freeman subject to this court's general or specific jurisdiction. As with United Guardian, there is no evidence that Freeman conducts "continuous and substantial" business within the forum. *Provident National Bank v. California Federal Savings & Loan Association,* 819 F.2d 434, 437 (3d Cir. 1987). Instead, the affidavit of Joel Freeman establishes that Freeman does little (if any) business in Pennsylvania.

8. Plaintiffs base their argument for specific jurisdiction on (1) a set of three documents sent to a potential customer in Pennsylvania regarding an allegedly infringing product and (2) two Freeman labels with Pennsylvania addresses on them. The proffered set of documents testifies only as to one, isolated advertisement, and does not testify as to any sale of a Freeman product. As for the labels, there is no evidence as to where they came from or as to the product(s) contained in packages to which they were affixed. Such scant evidence is insufficient to establish specific jurisdiction.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, COMPANY, INC.	:	CIVIL ACTION
v.	:	
AVON PRODUCTS, INC.	:	NO. 91-5015

ORDER

AND NOW, this 7th day of July, 1992, it is hereby ORDERED that:

1. Defendants' motions to dismiss or for summary judgment (docketed as Nos. 65, 67, and 68) are GRANTED, and summary judgment is ENTERED against plaintiffs and in favor of defendants Avon Products, Inc., Giorgio of Beverly Hills, Inc., and Macsil, Inc. Macsil, Inc.'s motion for sanctions and attorney's fees is DENIED.

2. Defendants United Guardian, Inc., and Freeman Industries, Inc., are DISMISSED pursuant to the conference held June 29, 1992, at which time the court ruled that it would enforce the settlement agreement previously entered into between plaintiffs and those defendants. The court retains jurisdiction to enforce the terms of said settlement.

3. This order having resolved the case as to all plaintiffs and defendants (defendant Marubeni, Inc., having previously been dismissed from the case), this matter is marked CLOSED.

BY THE COURT:

_____

J.

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 8 DB 91
Petitioner	:	Attorney Registration No. 32276
v.	:	
GREGORY H. WHEELER	:	Philadelphia County
Respondent	:	

REPORT OF HEARING COMMITTEE 1.09

Brief Summary of All Charges

This matter was before Hearing Committee 1.09 on a Petition for Discipline filed with the Disciplinary Board of the Supreme Court of Pennsylvania on September 13, 1991 and served on Respondent Gregory H. Wheeler on September 25, 1991. The Petition contained six charges, but Charge V was dismissed at the hearing on December 12, 1991 upon the motion of the Office of Disciplinary Counsel. (N.T. I 13)[1]

In Charge I, the matter of Allen W. Frasier, and Charge II, the matter of Elizabeth Cole-Sampson, Respondent Wheeler was charged with failing to appear on two occasions for scheduled informal admonitions. In Cole-Sampson, Mr. Wheeler was also charged with failing to comply with a condition of the administration of the informal admonition.

In Charges III, IV and VI, Respondent Wheeler was alleged to have engaged in professional misconduct in the course of his representation of three clients, respectively, Dean Chacker through his representative Marlene Brandwein, George Parker and Samuel Ellison. The more specific charges with regard to each Charge are set forth in the remainder of this Report.

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1. "N.T. I" followed by a number refers a page in the Notes of Testimony or Transcript of the hearing held on December 12, 1991.

Respondent did not file an Answer to the Petition for Discipline. A prehearing conference was scheduled for November 18, 1991. At that conference Mr Wheeler made a motion for a continuance to enable him to retain counsel. A fifteen-day continuance was granted. At the continued prehearing conference on December 3, 1991, Mr. Wheeler appeared without counsel. The remainder of the proceedings were conducted with Mr. Wheeler acting as his own attorney.

The deposition of Robert H. Davis, Jr. Acting Chief Disciplinary Counsel was held on December 10, 1991. Hearings on the matter were held on December 12, 1991 and December 19, 1991. The record was held open until December 23, 1991 to allow Respondent additional time to produce documentary evidence in his defense. Respondent declined to do so and the record was closed. On February 19, 1992, the Office of Disciplinary Counsel filed a brief. Respondent did not file a brief.

On April 8, 1992, the hearings were reconvened to receive evidence on the issue of the type of discipline to be imposed pursuant to Disciplinary Board Rule §89.151(a). A second hearing on the type of discipline was held, pursuant to a continuance by the Disciplinary Board, on May 12, 1992 to allow Respondent to bring additional evidence. The Office of Disciplinary Counsel filed a Memorandum of Law on the type of discipline to be imposed. Respondent did not file a memorandum of law.

The Hearing Committee makes the following conclusions. In regard to Charges One and Two, the Committee finds that Mr. Wheeler willfully failed to appear before Disciplinary Counsel for informal admonition. In regard to Charge II, the Committee further finds that Mr. Wheeler failed to comply with conditions attached to an informal admonition.

In regard to Charges III, IV and VI, the Committee finds that Respondent has violated certain of the Pennsylvania Rules of Professional Conduct and certain provisions of the former Pennsylvania Code of Professional

Responsibility as more fully explained in the remainder of this Report.

As to the disposition of this case, the Hearing Committee recommends that Respondent be suspended for one year and one day with certain conditions of reinstatement as described at the end of this report.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC., ET AL.,	)	CA 91-5015
	)	Philadelphia, PA
Plaintiffs,	)	June 29, 1992
	)	9:22 A.M.
v.	)	
	)	
AVON PRODUCTS, INC., ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	GREGORY H. WHEELER, ESQ. 600 Upland Avenue Upland, PA 19015
For the Defendants:	ALAN H. BERNSTEIN, ESQ. ROBERT S. SILVER, ESQ. 1635 Market Street Philadelphia, PA 19103 For Avon and Georgio
	BRADLEY K. MOSS, ESQ. 1735 Market Street Philadelphia, PA 19103 For Macsil
Audio, Operator:	DAVID T. HAYES
Transcribed by:	DIANA DOMAN TRANSCRIBING P.O. Box 67 Audubon, NJ 08106 (609) 547-2506

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(Call to Order of the Court.)

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE COURT: Please be seated. State your appearances for the defense please.

MR. BERNSTEIN: Alan Bernstein. I'm here in a dual role, Your Honor. I'll explain why. I'm first of all here for my regular clients Avon and Georgio of Beverly Hills. I received a telephone call from Mr. Battersby, the attorney for United Guardian and Freeman and Marubeni, and they had a personal problem up there, and he asked me for this one hearing to stand in for them. So today Mr. Silver and I are representing five of the six defendants.

THE COURT: Thank you.

MR. MOSS: I represent the last defendant. My name is Bradley K. Moss, and I represent defendant Macsil, Inc. That's M-A-C-S-I-L.

THE COURT: I've spoken to the plaintiff's attorney who is out of town and is not going to be here today. What are we to accomplish today?

MR. BERNSTEIN: This was a regularly scheduled status conference in your April 22, 1992. At the last status conference which I believe was in late April, Your Honor had issued a strong statement that you felt that there should be a round of dispositive motions if the parties so desired. You issued a very strict briefing schedule. All of the defendants complied with that briefing schedule filing briefs within seven days or ten days, and the plaintiff's attorney has not filed — had not filed a brief in opposition until late last week, probably well over a month late. I know you issued orders giving extensions of time which we had opposed, and that's where we stand. Those summary judgment motions are pending before you.

MR. MOSS: Your Honor, in particular, with respect to defendant Macsil, you had directed that I take and we did take the deposition of the plaintiff's alleged expert.

That deposition was taken shortly after our last conference. At our last conference, you said that if the expert was not able to provide the defendant of evidence, some evidence, that there was in fact in this case Teflon in the product, any of our products, that you would look very favorably upon a motion for summary judgment. We did take that deposition. I have filed on, April 29th a motion for summary judgment. That expert could not identify in my client's product Teflon with polyfluorocarbons (sic). He so stated in his deposition. I then also went out and got my own expert, Your Honor, whose affidavit is also part of the motion for summary judgment who says that based on his research, there is no poly – no Teflon in my products – in my client's product. At this time, I would hope that we might be in a position to rule on a motion for summary judgment. In the interim, Your Honor, we also. . .

THE COURT: Excuse me. Do you have an affidavit from your client. . .

MR. MOSS: Yes, Your Honor.

THE COURT: . . . stating that as your product was designed, it does not contain the accused products?

MR. MOSS: Yes. That's Exhibit E, Your Honor, Exhibit E to my motion. It says, "The only ingredients in Balmex are. . ." Then he goes on and states what they are, and that's paragraph three. Paragraph four says, "Poly – excuse me – perfluorocarbon resins, commonly known as Teflon, are not used in making Balmex." So, yes, I do have that affidavit drawn. We also had a change of counsel or an addition – here's Mr. Wheeler. We also had an addition of counsel in the interim. Counsel has now noticed my client's deposition and was also served some requests for production of documents. I would hope that if my motion is granted, there would not be the need for my client's deposition or to respond to the request for production of documents, although with respect to the request, Your Honor, I've gone through it with my client, and a response would be rather easy because there are no documents showing

that Teflon is — or whatever you want to call it is in my client's product.

THE COURT: What is the basis of your motion for summary judgment?

MR. BERNSTEIN: Your Honor, we had an affidavit similar to the affidavit that Mr. Moss' client had. Our affidavit shows that at most my client's product contained what we call 100 parts per million of Teflon. That is a fraction of one over a thousand, a very minute amount which our affidavit states specifically is not a significant amount of Teflon, and it's not even Teflon. It's fluorine which could have crept in from the water that's used in testing and minute impurities in the materials. There's no establishment of Teflon at all, and on that basis, our expert stated that the small amount of fluorine ion, as we call it, is not significant.

THE COURT: Is there any counter evidence?

MR. BERNSTEIN: There is no counter evidence. Furthermore, there are about four or five other counts in the complaint, conspiracy, RICO, which are totally baseless and which there is no counter evidence on that. I would like to say this. If Your Honor should deny any aspect of our summary judgment motion — in other words, there's five counts of the complaint. Let's say Your Horror should grant the motion as to four, and maybe as to the fifth, for some reason, you feel you can't grant it. I would ask the Court to hold another hearing like this within two or three weeks after that so that we can see where this case is going. Obviously, the pendency of the summary judgment motions has put a total end to discovery because it's our position that there's nothing more to the case and the case should be ended. So there's nothing happening until we have your decision, and what I'm asking you to do is if you would please set a hearing like this about two weeks after your decision so we can see what we're going to do with whatever is left in the case. Now, for my mind, my feeling is that if Your Honor for some reason does not grant summary judgment as to the patent count, that

there ought to be a neutral testing company selected to run tests here because you can't see minute amounts of fluorine in a mix. We have their test which was not – as we pointed out in our moving paper, which was not an appropriate and sufficiently analytical test. You have our test which we believe is proper, but if for some reason you feel that the case has to go on, then I strenuously submit that we should talk about appointing a neutral expert because my client doesn't have fluorine, doesn't need fluorine, and has none of the benefits of fluorine or Teflon in any of its products. Thank you.

THE COURT: Mr. Wheeler?

MR. WHEELER: Your Honor, excuse my delay. I got caught on the bridge, but as to the defendant, Mr. Moss' client, I have – Macsil, I'm sorry. I have advised my client that I felt after receiving all of the information, that I thought that Macsil should no longer be held in this case for a number of reasons. I have advised that as to some of the other defendants, there should be also a partial release. As to Avon, I believe there is sufficient evidence to continue this matter on the patent counts. As you know, there has been. . .

THE COURT: Excuse me. As to which defendants are you conceding judgment?

MR. WHEELER: As to Macsil, I have advised my client that I felt that they should not be in the case any longer at this point. As to. . .

THE COURT: Well, what are you telling me? Are you telling me that you've advised your client or are you trying to advise the Court?

MR. WHEELER: Well, I have advised my client. As you know, there has been this introduction of new counsel at some point. I have not had . . .

THE COURT: Well, Counsel, if you don't see any basis to proceed, I will grant the motion for Macsil.

MR. WHEELER: I have also advised that as to the defendant Georgio, I felt that they should no longer be in the case.

THE COURT: Georgia will also be out, is out. Who else?

MR. WHEELER: United Guardian is not here today.

MR. BERNSTEIN: You don't know. I'm representing them just for this meeting.

MR. WHEELER: I see, okay. And I have advised that as I did at the last hearing, that we should go with the original settlement agreement on the two products which were obviously infringement patents and that . . .

THE COURT: United Guardian is settled?

MR. WHEELER: Well, we had entered into settlement negotiations and reached a settlement in principle. My client had never signed the actual settlement papers. The Court . . .

THE COURT: Has he signed the papers?

MR. WHEELER: No, he has not.

THE COURT: Why not? He's directed to by Wednesday of this week. Otherwise, I'll enter a judgment in favor of those defendants. I mean this is very plain, very simple, because his action is contemptuous. I'll give him a chance to resolve it. Otherwise, judgment will be entered in favor of the defendants as a sanction. And which defendants are they?

MR. WHEELER: That's United Guardian. Marubeni, there had already been a settlement in our last record I believe. They're out of the case.

THE COURT: Has the agreement been signed by your client?

MR. WHEELER: I don't believe so.

THE COURT: The same ruling applies.

MR. WHEELER: All right.

MR. BERNSTEIN: How about Freeman?

MR. WHEELER: Freeman was covered by the United Guardian. I'm sorry. They were a defendant, but they were covered by the United Guardian settlement.

MR. BERNSTEIN: Let me ask you this. As to Avon, there are Counts 2 to, whatever, 6 of the complaint, conspiracy, RICO, fraud. Are they also out of the case now?

MR. WHEELER: I have not discussed that with my client. I would be willing to discuss that and consider dropping those counts. Also, as to the appointment or the use of a neutral expert, I believe we had agreed to that at the last hearing.

MR. BERNSTEIN: Right, right, right.

THE COURT: We're not at that point. We're at a point whereas to pending motions, I have to resolve the matter based upon the principles applicable to analyzing such motions.

MR. BERNSTEIN: There's no evidence as to fraud and conspiracy and RICO at all, and I submit that they should be dismissed from the case also as to Avon.

MR. WHEELER- Well, I'm just saying I have not discussed it with my client at all on those particular – as to Avon.

THE COURT: Well, what arguments have you made if any counter to the motion to dismiss or the motion for summary judgment as to those counts?

MR. WHEELER: Well, there have been no arguments submitted thus far, Your Honor.

MR. BERNSTEIN: Your Honor, Ms. Williams did file a brief. We got it on Friday.

THE COURT: What evidence is there?

MR. BERNSTEIN: And there is none; there is no evidence.

THE COURT: Then those motions will be granted as to those counts.

MR. BERNSTEIN: Thank you.

THE COURT: As to Avon, Mr. Wheeler, what evidence is there counter to the evidence submitted by Avon that analysis shows one part in a million with respect to fluoride – fluorine?

MR. WHEELER: Well, the evidence I believe . . .

THE COURT: And no Teflon.

MR. WHEELER: The evidence is the patents themselves, number one. The patents involved only call for a minute amount of the material to be in it to make it effective.

THE COURT: Well, what evidence is there that this amount would make it effective?

MR. WHEELER: That's what I'm saying. The patents themselves call for merely minute amounts such as that.

THE COURT: Well, very minute has to be defined. Now, their expert said that one part in a million is not significant.

MR. WHEELER: One of the things our expert has said that – because we specifically questioned whether that amount of fluorine that was found in the products could be caused by water or anything else. And he said absolutely not because if the water had that much fluorine in it, it would be dangerous to human beings for drinking purposes and otherwise. SC, it wouldn't be caused by water or anything else in there.

THE COURT: Well, that's not an explanation. That doesn't satisfy me that it could riot have been. There's plenty of water around that's called dangerous to drinking. . .

MR. WHEELER: Well, what I'm saying . . .

THE COURT: . . . that's nevertheless drunk.

MR. WHEELER: When I say dangerous, he said fatal. You couldn't have that. The amount in drinking water and water, the tap is much less than that one per thousand.

THE COURT: One per million or one per thousand?

MR. WHEELER: One per thousand I believe it was.

MR. BERNSTEIN: By arithmetic that's a thousand per million? One per thousand? You add three zeroes. That's a thousand per million.

THE COURT: A thousand per million or is one in a thousand.

MR. WHEELER: Yeah.

THE COURT: So a thousand parts per millior, is – and do you have an affidavit that says that that amount would be significant for purposes of. . .

MR. WHEELER: I don't have art affidavit . . .

THE COURT: Okay. That's the basis upon which I will analyze it, whether or not it would be significant for purposes of the chemical reactors which you claim is patented. If it's not significant, then, – chemically, if it's not significant, then you can't claim patent infringement because the benefit that you claim for your patent could not be replicated through the Avon product. Is there anything else? Thank you very much. A decision will be made on this in the next two weeks.

MR. WHEELER-. Thank you, Your Honor.

THE COURT: Now, you had requested – well, inasmuch as Mr. Moss' client is no longer in the case, your request to take the deposition of the principal is mooted.

MR. WHEELER: Thank you very much.

MR. MOSS: Your Honor, will you be issuing just an order?

THE COURT: Yes.

MR. MOSS: Thank you, Your Honor.

THE COURT: Thank you.

CERTIFICATION

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter."

_____

Kathleen Nazarok

Date: July 7, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON COMPANY, INC., FABALON LABORATORIES, INC., FABALON, INC., HOWARD L. SCOTT, THE KAREN AND WENDY SCOTT TRUST, THE FIRST FOUNDATION, CHARLES N. WRAGG, JR. and BEVERLY L. WRAGG	: CIVIL ACTION
v.	:
AVON PRODUCTS, INC., UNITED GUARDIAN, INC., FREEMAN INDUSTRIES, INC., MARUBENI AMERICA CORPORATION, GIORGIO OF BEVERLY HILLS, and MACSIL, INC.	: NO. 91-CV-5015

MEMORANDUM OF LAW OF DEFENDANT MACSIL, INC. IN OPPOSITION TO PLAINTIFFS' MOTION TO REMOVE GREGORY H. WHEELER

Defendant Macsil, Inc., by and through its counsel, submits this memorandum of law in opposition to plaintiffs' motion to remove Gregory H. Wheeler. For the reasons set forth in the memorandum of law of defendants Avon Products, Inc. and Georgio of Beverly Hills, plaintiffs' motion should be denied and the Clerk's office should be notified not to accept any further filings in this matter unless they are first approved by the court.

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filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) *Record for preliminary hearing in the court of appeals.* — If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

Rule 12. Docketing the appeal; filing of the record

(a) *Docketing the appeal.* — Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

(b) *Filing the record, partial record, or certificate.* — Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) *[Dismissal for failure of appellant to cause timely transmission or to docket appeal] [Abrogated]* (As amended Apr.1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

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TELECOMMUNICATIONS TRANSMITTAL SHEET

DATE: 2/03/92 TIME: 2.00

PLEASE DELIVER TO: Howard Scott

FROM: Ken Globus

MESSAGE

I have discussed your fax of 1/26 with Dr. Alfred Globus, Bob Rubinger, and Stan Fine, our Senior Vice President, and we are all in agreement that we would be happy to accomodate your request to have the agreement signed on the campus of Widener University if you would like to do so. Since we appreciate the trip you made to see us (especially in that bad weather!), we would be happy to return the favor. Of course, all of this assumes that we will be able to reach a final agreement based on the terms that we discussed, which we all feel confident we will be able to do. When we get to that point we will discuss with you when we might be able to get together.

Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

No. 93840

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOWARD L. SCOTT,

Petitioner,

v.

AVON PRODUCTS, INC., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS AVON PRODUCTS, INC. GIORGIO OF BEVERLY HILLS, INC. AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

Pro se Petitioner's questions presented for review are merely a scurilous, unfounded and incomprehensible attack on the parties and the district court judge and it is submitted do not constitute proper questions for review.

CORPORATE DISCLOSURE

Respondent Giorgio of Beverly Hills, Inc., is a wholly owned subsidiary of Avon Products, Inc.

PARTIES TO THIS PROCEEDING

Petitioner: Howard Scott, pro se, and no other petitioner

Respondents: Avon Products, Inc. and Giorgio of Beverly Hills, Inc.

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OTHER:

9 *Moore's Federal Practice*, note 4, ¶204.14, pp. 4-124.3 to 4-125 6

JURISDICTION OF THE SUPREME COURT

The Supreme Court lacks jurisdiction over the petition for writ of certiorari since the underlying notice of appeal from the district court to the United States District Court of Appeals for the Third Circuit was untimely. 28 U.S.C., Rule 4, Fed.R.App.P.

Petitioner's Statement of the Jurisdiction of this Court fails to discuss the time factors upon which jurisdiction rests as required under Supreme Court Rule 24(e).

STATUTORY PROVISIONS

28 U.S.C., Rule 4, Fed.R.App.P. (Respondents' Appendix 1b-3b)

STATEMENT OF THE CASE

Respondents provide this statement of the case not because these facts are absolutely necessary to dispose of the petition, but because of the massive confusion created by Petitioner's incomprehensible petition for writ of certiorari. Respondents' Appendix includes documents of record which Petitioner failed to include in his Appendix.[1]

Pro se Petitioner Howard Scott was the named inventor in certain issued United States and foreign patents for certain cosmetic compositions and methods of treating skin using those compositions. Mr. Scott assigned all his right, title and interest in and to those patents to Widener University in Delaware.

Mr. Scott apparently owns an interest in certain entities which he listed in the parties to this proceeding, including various Fabalon corporate entities involved in the cosmetic business, however, since Mr. Scott is appearing pro se, it is submitted that he is not entitled to represent any alleged interest of these corporate and other listed entities.

Mr. Scott, Fabalon Co., Inc., and others, sued Respondents Avon Products, Inc., Giorgio of Beverly Hills, Inc. (and others) for patent infringement, RICO violations and other outlandish state causes of action relating to alleged infringement of the patents he no longer owned any rights in. The plaintiffs were at that time represented by attorney Gregory H. Wheeler. Mr. Wheeler had been the subject of a disciplinary proceeding before the Disciplinary Board of the Supreme Court of the Commonwealth of Pennsylvania, for certain actions unrelated to this case. The initial reviewers of Mr. Wheeler's complained of actions recommended that he be suspended for a year and a day (Pet. A-13 to A-15),

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1. References to Petitioner's Appendix are denoted (Pet. A-) and references to Respondents' Appendix are denoted (Respon. A-) followed by the relevant page number.

however, this was never implemented. Mr. Scott acknowledges that it was only a recommendation on page 2 of his petition, but misleads this Court by stating in his first question presented that Mr. Wheeler had in fact been disbarred. Sometime thereafter, plaintiffs also obtained counsel Ms. Vernita Williams (Pet. A-7), Mr. Scott's niece, but Mr. Wheeler remained as plaintiffs' counsel.

After completing certain discovery, Respondents Avon Products, Inc., Giorgio of Beverly Hills, Inc., and others moved for summary judgment on all counts of the complaint. At a regularly scheduled status conference in the case held on June 29, 1992 (Pet. A-16,17), the district court judge briefly discussed on the record the pending motions for summary judgment (Pet. A-17-21). Mr. Wheeler was present at that status conference (Pet. A-20) and the district court judge acknowledged on the record that he had just spoken to plaintiffs' counsel [Ms. Vernita Williams] who would not attend the hearing since she resided in Florida (Pet. A-17).

Thereafter, on July 7, 1992, the district court granted summary judgment on all counts of the complaint in favor of Respondents Avon Products, Inc. and Giorgio of Beverly Hills, Inc. (Pet. A-12). In granting the summary judgment motion, the district court opinion expressly relied only on matters in the record, and not on any statements Mr. Wheeler made at the status conference, as is readily clear from reading the text of the opinion (Resp. A-4b). The district court closed the case on July 9, 1992, which was entered on July 16, 1992.

Mr. Scott, in a pure act of desperation and lacking any substantive legal skills, apparently on behalf of himself and others, belatedly filed a long series of appeals and requests for reconsideration, which were all denied. Mr. Scott repeatedly alleged that Respondents, the district court judge and Mr. Wheeler conspired to create a fraud to have the case dismissed.

On July 22, 1992, plaintiffs moved to set aside the July 10, 1992 Order granting summary judgment. The

court denied the motion on October 2, 1992 (entered on October 5, 1992).

On November 4, 1992, plaintiffs moved to remove Mr. Wheeler from the case and the motion was denied on November 19, 1992. Plaintiffs (other than Mr. Scott) filed an untimely notice of appeal on December 18, 1992, which was entered on December 30, 1992. Mr. Scott filed his own untimely notice of appeal on December 23, 1992, entered on December 28, 1992.

After the plaintiffs-appellants filed two their appeals, sua sponte, the Third Circuit requested that they explain to the court why they believed jurisdiction of the appeals existed in view of the court's belief that jurisdiction was lacking. All parties responded to such a request and all appellees moved to dismiss the two appeals for lack of jurisdiction and requested sanctions.

While the appellees Avon Products, Inc. and Giorgio of Beverly Hills, Inc. filed a brief in the first docketed appeal, they subsequently filed a motion to defer filing a brief in the second appeal until the Third Circuit decided whether jurisdiction existed, in view of the court's sua sponte requesting the plaintiffs to explain why jurisdiction existed. The Third Circuit denied Mr. Scott's motion to vacate that extension of time and as a matter of judicial economy granted appellees ten days after the jurisdiction issue was decided to file a brief on the merits, hence no briefing schedule was set in the second appeal (Pet. A-3, 4). This extension of time to appellees appears to be what Mr. Scott is now complaining of in his second question presented, in that he contends he should have been permitted to file an appellant's brief prior to having the second appeal dismissed.

The United States District Court of Appeals for the Third Circuit dismissed Mr. Scott's and the other plaintiffs-appellants' two appeals Nos. 92-2090 and 92-2115, for lack of jurisdiction on the merits and for mootness of any remaining issue regarding removal of an attorney from a closed case on April 28, 1993 (Pet. A-3,4). The Third Circuit also granted Respondent's

motions for dismissal. Mr. Scott appeals from the dismissal of the two appeals.

On May 28, 1993, the Third Circuit refused Mr. Scott's petition for rehearing en banc (Pet A-2).

Mr. Scott's petition for writ of certiorari contains clear misstatements of fact, and is incomprehensible and therefore impossible to address. The petition provides no legal authority for the requested relief.

SUMMARY OF THE ARGUMENT

Mr. Scott's Notice of Appeal to the United States Court of Appeals for the Third Circuit, was *untimely* under Rule 4, Rules of Appellate Procedure, since the Notice was dated more than 30 days after entry of each of the judgments and orders appealed from. A timely notice of appeal is jurisdictional and mandatory. Since Mr. Scott's appeal to the Third Circuit was untimely, and was dismissed for lack of jurisdiction on the merits, the Court lacks jurisdiction to hear Mr. Scott's petition for writ of certiorari.

Mr. Scott also lacks standing to file a petition for writ of certiorari. In the district court action, Mr. Scott, was a named plaintiff. Mr. Scott was the patentee of certain patents in suit which he ultimately assigned all right, title and interest in, to Widener University. Mr. Scott therefore lacked standing to be a patentee-plaintiff and has no standing to file the present petition.

Since Mr. Scott, is appearing pro se, he is only entitled to represent any alleged rights he has, and not the rights of any other corporate or other entities.

ARGUMENT

This opposition to Mr. Scott's petition for writ of certiorari is filed by Respondents Avon Products, Inc. and Giorgio of Beverly Hills (hereinafter "Avon" and "Giorgio").

Respondents Avon and Giorgio submit that the Court lacks jurisdiction to grant the petition.

Mr. Scott's Notice of Appeal to the United States Court of Appeals for the Third Circuit, was *untimely* under Rule 4, Rules of Appellate Procedure, since the Notice was dated more than 30 days after entry of each of the judgments and orders appealed from.[2] A timely notice of appeal is jurisdictional and mandatory. *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61 (1982); 9 *Moore's Federal Practice,* note 4, ¶204.14, pp. 4-124.3 to 4-125.

The district court granted Respondents' motion for summary judgment on all counts of the complaint in an order dated July 7, 1992 (Pet. A-12). Notice of appeal to the Third Circuit (which was the wrong court) were untimely filed on December 18, 1992 and December 23, 1992.

Since Howard Scott's appeal to the Third Circuit was untimely, and was dismissed for lack of jurisdiction on the merits, the Court lacks jurisdiction to hear Mr. Scott's petition for writ of certiorari.

Mr. Scott also lacks standing to file a petition for writ of certiorari. In the district court action, Mr. Scott, was a named plaintiff. Mr. Scott was the patentee of certain patents in suit which he ultimately assigned all right,

---

2. The last Order which plaintiffs appealed from dated November 20, 1992, was the denial of substantially the same motion plaintiffs previously filed on September 11, 1992, which was also denied. Although plaintiffs' Notice of Appeal was filed less than 30 days after November 20, 1992, the appeal with respect to that Order should be dismissed since the movant's request for substantially the same relief was previously denied by the District Court on October 5, 1992, and again previously denied by the Court in its August 27, 1992 Order.

title and interest in, to Widener University. Mr. Scott therefore lacked standing to be a patentee-plaintiff and has no standing to file the present petition. Mr. Scott is not entitled to represent the interests of the other named petitioners, in view of his status as a pro se litigant.

Mr. Howard Scott's motions filed in the district court on and after September 11, 1992, requesting repeated reconsideration and request for removal of plaintiffs' counsel Mr. Wheeler, were barred by *res judicata* and collateral estoppel. The Plaintiffs' filing of these repeated motions and the District Court's repeated denial of these motions therefore did not reset the time period for the taking of an appeal from the July 9, 1992 Order (entered on July 10, 1992), granting Defendants' Motion for Summary Judgment, which expired on or about August 10, 1992.

CONCLUSION

Mr. Scott's petition for writ of certiorari should be denied since his underlying appeal was untimely and he lacks standing to seek review in this Court.

Respectfully submitted,

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Rule 4. Appeal as of Right – When Taken.

(a) APPEALS IN CIVIL CASES.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time of appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of

the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any other party within 21 days of its entry and (b) that no such party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrests of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be

taken within 10 days after the entry denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after the entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, INC., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
AVON PRODUCTS, INC., et al.	:	NO. 91-5015

MEMORANDUM

GILES, J. JULY 7, 1992

Plaintiff Howard L. Scott ("Scott") is the inventor of several skin lubricants and methods of skin lubrication which employ perfluorocarbon resins, also known as Teflon. Co-plaintiffs Fabalon, Inc., The First Foundation, The Karen and Wendy Scott Trust, Charles N. Wragg, Jr., and Beverly L. Wragg are corporations, trusts and individuals to whom Scott has assigned these patents,[1] and co-plaintiff The Fabalon Company, Inc. ("Fabalon"), is a company licensed and authorized to administer the patents.[2] Plaintiffs have filed suit against Avon Products, Inc. ("Avon"), Giorgio of Beverly Hills, Inc. ("Giorgio"), Macsil, Inc. ("Macsil"), United Guardian, Inc. ("United Guardian"), Freeman Industries, Inc. ("Freeman"), and Marubeni America Corporation ("Marubeni"), alleging patent infringement and other related counts.

This memorandum and order address motions to dismiss and/or for summary judgment filed Avon, Giorgio and Macsil. For the reasons stated below, this court grants the motion and enters summary judgment against plaintiffs and in favor of defendants Avon, Giorgio and Macsil.

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1. Scott also assigned patents to Widener College, namely patents '939 and '549.

2. The complaint does not provide any details as to the identity of co-plaintiff Fabalon Laboratories, Inc.

I. BACKGROUND

Scott and several Fabalon representatives met with representatives of Avon in 1987 to discuss the possibility of Avon purchasing the right to use plaintiffs' patents in its cosmetic products. During these meetings plaintiffs provided Avon with descriptions of plaintiffs' products and their contemplated uses. Later, plaintiffs also provided samples of the patented products for Avon's inspection and testing. Several months after the meetings, however, Avon notified plaintiffs that it was declining to enter into a licensing agreement.

Plaintiffs allege that, several years after these meetings, in approximately January of 1991, they discovered that Avon was using plaintiffs' Teflon-based compositions and processes in several of its products. It alleges that it later discovered that the other defendants, including Giorgio and Macsil, were also using its Teflon-based products. Plaintiffs brought suit seeking compensatory damages and an injunction against the use of infringing products and methods.

Specifically, plaintiffs allege infringement of six United States patents and one United Kingdom patent. The United States patents are as follows: 3,932,614 (" '614") ("Method of Lubricating or Softening the Skin"), 4,087,517 (" '517") ("Method of Dry Lubricating the Skin"), 4,062,939 (" '939") ("Perfluorocarbon Resins in a Hair and Scalp Conditioning and Cleansing Composition"), 3,911,106 (" '106") ("Hair and Scalp Conditioning Containing Polytetrafluoroethylene"), 4,115,549 (" '549") ("Coating the Hair with a Heat-Settable Composition"), and 3,949,764 (" '764") ("Treatment of Natural and Synthetic Hair with a Heat-Settable Composition") The British patent is 1,575,201 (" '201") ("Method of Lubricating or Softening the Skin") Complaint, Exhibit A-G.

In addition to alleging patent infringement, plaintiffs accuse Avon, Giorgio and Macsil of theft by deception. Avon and Giorgio are further charged with violations of 18 U.S.C. § 1961 *et seq.*. ("RICO") , and Avon is additionally charged with counts of conspiracy and fraud. All of these counts relate to and stem from the underlying allegation of patent infringement.

Defendants have filed a series of motions to dismiss and/or for summary judgment. This memorandum and order examines the motions filed by Avon, Giorgio and Macsil. All parties have filed affidavits in support of their motions or opposition thereto. The court will consider the affidavit testimony and consider the motions as motions for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment will be entered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party which must "demonstrate the absence of a genuine issue of material fact." *Celotex Co v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party makes such a showing, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party must satisfy this burden through the introduction of testimony "as would be admissible in evidence," *Id.*, such as an affidavit or deposition testimony. Fed. R. Civ. P. 56(c). If, however, the moving party ultimately persuades the court that there are no genuine issues of material fact, then the court must decide whether the law dictates an outcome in favor of the moving party. If so, the motion for summary judgment must be granted.

III. PATENT INFRINGEMENT

a. *Failure to construe patent claims*

Analysis of a patent infringement allegation entails a two-step process: "determination of the scope of the claims, as a matter of law; and the factual finding of whether properly construed claims encompass the accused structure." *Texas Instruments v. U.S. Intern. Trade Com'n,* 805 F.2d 1558, 1562 (Fed. Cir. 1986). Here, the "claims" referred to are those listed in the patent at issue, wherein the holder declares "I claim . . . ", followed by the specific description(s) of the product or method covered by the patent. For example, patent '614 reads:

> I claim:
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> 1. A method of lubricating or softening the skin which comprises applying to the skin a composition comprising water, carboxypolymethylene and about 1 to about 50% by weight of a lubricating agent selected from the group consisting of chlorotrifluoroethylene, the homopolymer of tetrafluoroethylene, the homopolymer of hexafluoropropylene, and the copolymer of tetrafluoroethylene and hexafluoropropylene having the formula $(-CF_2CF_2-CF_2CFCF_3)_n$ where n is an integer corresponding to the number of repeating units in the copolymerized chain, said lubricating agent having a particle size of between about 0.01 to about 30 microns and said composition having a pH of about 7-8.1.
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> 2. The method of claim 1 wherein the particle size of said lubricating agent is between about 0.01 and about 0.5 microns.

Complaint, Exhibit A. Thus, to analyze whether patent '614 has been infringed, it is necessary to construe the patent's (two) claims and to see whether the allegedly infringing product is encompassed by either of the

claims. To prove infringement, plaintiff must show that the accused product embodies every element of one or more of the claims. *Texas Instruments,* 805 F.2d at 1562.

Plaintiffs have failed to perform this two-step process for any of the patents which they allege to have been infringed, and for that reason alone defendants are entitled to summary judgment. From the outset, plaintiffs' sole allegation has been that defendants' products contained Teflon. While this allegation, together with the general allegation that certain patents have been infringed, may satisfy the notice pleading standard of Fed. R. Civ. P. 8(a), it is insufficient at this point, where defendants have advanced motions for summary judgment.

The problem is that plaintiffs do not own the patent on Teflon *per se.* Thus, it is not enough to show that defendants' products contain *some* amount of Teflon.[3] Rather, plaintiffs have the burden of construing the patent claims at issue and demonstrating that the challenged methods or products are fully encompassed by at least one of a given patent's claims.

For example, in regard to patent '614, cited *supra,* there is no specific allegation nor any documentary evidence that any of the allegedly offending products includes a "lubricating agent having a particle size of between about 0.01 to about 30 microns and said composition having a pH of about 7-8.1" (claim 1) or a similar agent having the particle size of "between about 0.01 and about 0.5 microns" (claim 2). Complaint, Exhibit A. Nor is it alleged or demonstrated that the offending products are composed of "water, carboxypolymethylene and about 1 to about 50% by weight of a lubricating agent". Indeed, it is not even made clear by plaintiffs' expert that the lubricating agents listed in claim 1 of patent '614 are types of Teflon. The court

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3. As discussed *infra*, they have not even done this in regard to some of the targeted products.

presumes that they are, but the court should not have to make such presumptions.

Each of the other patents at issue also contains compositional and/or other physical specifications similar to that cited above, and none is by plaintiffs or by plaintiffs' expert. Complaint, Exhibits C-G. Instead, plaintiffs' expert testimony is limited strictly to the identification of Teflon as one of the components found in defendants' products. Nowhere does plaintiffs' expert cite to the patents' chemical specifications, and (as a result) nowhere does he render an opinion as to the infringement of any of plaintiffs' patents.

b. *Failure to prove unlawful use of Teflon*

Defendants' motions for summary judgment must also be granted on a second, independent ground, as to all but three of Avon's products, *see infra.* Even if the court is correct in presuming that the chemical substances listed in plaintiffs' patents are Teflon, and putting aside plaintiffs' failure to construe the patent claims properly, plaintiffs have also failed to support their proposition that defendants' products contain Teflon sufficient to violate plaintiffs' patents.

Turning first to the Giorgio products, plaintiffs' allegation that Teflon is used in them ***at all*** is utterly without foundation. Plaintiffs' identified expert witness is Dr. Yen Wei, Associate Professor of Polymer Chemistry at Drexel University. Dr. Wei offered affidavit testimony after performing a spectroscopic analysis and solubility test on two Giorgio products.

In his analysis of Giorgio Beverly Hill Extraordinary After Shave Lotion with Collagen (sample #25), Dr. Wei concludes: "This sample definitely contains polymer. The polymer might be the collagen, which is listed as an ingredient in the label of the product. Note that collagen is a natural polymer." Plaintiffs' Memorandum in opposition to Giorgio Motion to Dismiss or for Summary Judgment, Exhibit A. This conclusion does not dictate the presence of Teflon.

In his analysis of Giorgio Beverly Hill Extraordinary Exau de toilette natural Spray (sample #26), Dr. Wei concludes: "This sample is likely to contain polymer, which might have ester functional groups. The data are not sufficient to determine whether there are fluorine-containing polymers (Teflon] in the sample." *Id.* While the possible presence of Teflon is at least mentioned in this second conclusion, Dr. Wei states that he cannot determine whether any Teflon is present. Thus, there is no evidence that either Giorgio product contains *any* Teflon, much less a level of Teflon which would amount to a violation of plaintiffs' patents.

The only Macsil product alleged to infringe is Balmex, an emollient and protective ointment. Dr. Wei's analysis led him to conclude: "This cosmetic product might contain Teflon because the IR bands match those of typical Teflon standards to certain extent. Since the exact match of the bands was not observed, no definite conclusion can be drawn from these data." Memorandum in Support of Macsills Motion to Dismiss or for Summary Judgment, Exhibit A at 11.

Balmex was one of the products (along with several Avon products, *see infra*) which was subsequently sent to Micro-Analysis, Inc. ("Micro-Analysis"), for an elemental analysis. According to the elemental analysis the Balmex sample sent by Dr. Wei is .46% fluorine by weight. Memorandum in opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 11. In his deposition testimony, however, Dr. Wei testified that the sample sent to Micro-Analysis consisted of a solid extract from a larger amount of (wet) Balmex. Memorandum in Support of Avon and Giorgio's Motion to Dismiss or for Summary Judgment, Exhibit D at 91-100. According to Macsills expert, John G. Nikelly, a professor of analytical chemistry at the Philadelphia College of Pharmacy and Science, the percentage reported by Micro-Analysis must therefore be divided by approximately fourteen to yield the percentage attributable to

the original sample of (pure) Balmex.[4] Memorandum in Support of Macsills motion to Dismiss or for Summary Judgment, Exhibit G at ¶4. This means that, according to Micro-Analysis' elemental analysis of the dry sample, Balmex is approximately .03% fluorine. Professor Nikelly ordered his own elemental analysis from Oneida Research Services, Inc., which yielded a fluorine content of only .01% for the dry sample, or .0007% for the Balmex product. *Id.*

Based upon Micro-Analysis' elemental analysis of the Avon and Macsil products, including Balmex, Dr. Wei amended his original set of conclusions to state that "[b]ased on the ingredients listed for each product there would be no other basis for the existence of fluorine in the products but for the inclusion of perfluorocarbon resin." Opposition to Macsil Motion to Dismiss or for Summary Judgment, Wei Affidavit at ¶7. Even this conclusion, however, falls short of the type of affirmative statement needed to survive defendants' motion for summary judgment.

It is unconstested that cosmetics may pick up trace amounts of fluorine during the manufacturing process, either through water or through certain metals. Avon's Motion to Dismiss or for Summary Judgment, Declaration of Dr. Benjamin Mosier at ¶12. The above-cited conclusion by Dr. Wei does not take this possibility into account. Ultimately, all Dr. Wei says is that, aside from trace amounts of fluorine picked up through the manufacturing process, only the presence of Teflon could account for the amounts of fluorine found in the Avon and Macsil products given the ingredients listed on their labels. This is simply not enough. Dr. Wei is unable to state affirmatively that the products *do* contain Teflon,

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4. Dr. Wei admits the necessity of dividing the dry sample percentage but does not offer a suggested number. Memorandum in Support of Avon and Giorgio's Motion to Dismiss or for Summary Judgment, Exhibit D at 91-100.

and he does not take into account the effects of the manufacturing process.

Moreover, Dr. Wei himself states that the elemental analysis of Balmex "may not be reliable since ion-exchange chromatography was used on the sample prior to elemental analysis." Memorandum in Opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 11. Professor Nikelly's conclusion that Balmex does not contain Teflon is based upon a much lower finding of .0007% fluorine content and contains no such disclaimer. *Id.* at ¶5. Plaintiffs have not met their burden of raising a genuine issue as to the presence of Teflon in the Macsil product.

Plaintiffs target a number of Avon products. For each of the following products, Dr. Wei's initial conclusion as to the presence of Teflon in these products was either "negative" or "might contain small amount of fluoro-compound but not sure": Daily Revival (sample #8), Night-Odyssey Shimmering Perfumed Talc (sample #12), Sun Seekers FACE Cream (sample #13), and Skin-So-Soft Hand & Body Lotion (sample #16). These and other Avon products were then sent to Micro-Analysis for further testing, after which Dr. Wei rendered his amended conclusion. For the reasons stated *supra*, however, Dr. Wei's initial conclusion, together with the limited nature of his amended one, are insufficient to demonstrate the presence of Teflon in the above-cited products.

Three Avon products remain to be considered: Sun Seekers Lotion (sample #10), Sun Seekers Children's Cream (sample #11), and Banishing cream (sample #4). Dr. Wei's initial analysis as to Teflon content yielded conclusions of "positive" for Sun Seeker's Lotion and Sun Seeker's Children's Cream and "quite sure" for Banishing Cream. The elemental analysis performed by Micro-Analysis yielded fluorine contents of 2.47%, 1.09%, and 14.95%, respectively. Again, however, this is the percentage of fluorine in the *dry* samples, not in the pure (product) ones. After dividing by fourteen, *see*

supra, the applicable percentages are approximately .18%, .08%, and 1.07 respectively, which correlate to Teflon weight contents of approximately .24%, .11% and 1.43%. opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 9. For these products, then, there is a genuine factual issue as to fluorine content of those percentages, notwithstanding the far lower percentages reported by Avon's expert, Dr. Mosier (.004%, .004%, and from .005%-.05%, respectively). Avon's Motion to Dismiss or for Summary Judgment, Declaration of Dr. Benjamin Mosier.

If the court assumes that the fluorine weights assigned by Micro-Analysis are accurate (as it must do in ruling on a motion for summary judgment), then these three Avon products do meet the Teflon weight requirement for some of the patents at issue. Nonetheless, plaintiffs' allegations of patent infringement still fail, because, as discussed *supra*, plaintiffs fail to construe and apply *each* element of at least one patent claim. For example, the holder of patent '106 claims as follows in claim 3:

> The method of claim 1 wherein said polytetrafluoroethylene is in a composition which also includes a thickening agent selected from the group consisting of a high molecular weight carboxyvinyl polymer comprising polyacrylic acid crosslinked with about 1% of polyallyl sucrose having an average of about 5.8 allyl groups for each sucrose molecule, methyl cellulose and a fatty alcohol, and a lubricating and dressing agent, said polytetrafluoroethylene being present in said composition in a proportion of about 0.1 to about 10% by weight, said thickening agent being present in a proportion of about 0.2 to 5% by weight, said thickening agent being present in a proportion of about 0.2 to 5% by weight and said lubricating and dressing agent being present in a proportion of about 5-80% by weight, the remainder being water.

While the Teflon weight content of the last three Avon products meets the weight requirement listed herein ("0.1 to about 10%"), there is no proof that any of the other claim elements are likewise met. Thus, the patent infringement claim fails for these three products as well.

IV. DERIVATIVE CLAIMS

The remainder of the counts in plaintiffs' Complaint allege conspiracy, fraud, theft by deception, and violations of RICO. Counts II-V. Each of these counts stems from the allegations of patent infringement examined above, although each count also requires plaintiffs to prove additional elements (conspiracy, for example, requires two or more of the defendants to have agreed together to infringe plaintiffs' patents). Because defendants are entitled to summary judgment on the patent infringement count, they are likewise entitled to judgment on the remaining counts. It is therefore unnecessary for the court to analyze defendants' other arguments for dismissal of Counts II-V.

V. CONCLUSION

Several contentions made by plaintiffs in opposing Macsills motion (but relating to all of the motions) deserve comment. Plaintiffs notes that by order dated November 27, 1991, this court denied a motion for summary judgment which Macsil had filed on September 20, 1991. Plaintiffs point out that the evidence presented at the time of that first motion is little different from that which is presented now, and they argue that the court must therefore deny summary judgment as it did in response to the first motion. A second, related point made by plaintiffs is that the court should not, in any event, grant defendants' motion until plaintiffs have more time to perform discovery, since plaintiffs' former counsel has just recently been substituted for new counsel.

The response to these two contentions is the same: plaintiffs have had more than ample time and opportunity to develop a case sufficient to withstand defendants'

motions for summary judgment. Macsills motion for summary judgment was denied based upon the following rationale:

> Granted, these chemical studies do not conclusively establish that Macsills products contain the patented resins, and plaintiff may ultimately be unable to prove such at trial. However, these studies do raise a genuine issue of material fact, which is all that is required at the summary judgment stage. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-24 (1986). Plaintiffs may still be able to obtain more conclusive lab results, and even if they cannot, they may be able to prove their case through a combination of circumstancial evidence. Therefore, summary judgment is not warranted at this time.

The Fabalon Company, et al. v. Avon Products, et al., Civil Action No. 91-5015 at ¶3 (E.D. Pa. Nov. 27, 1991).

As the court's prior ruling made clear, summary judgment was not proper "at this time" based solely on the specific possibility that "[p]laintiffs may still be able to obtain more conclusive lab results" or otherwise "prove their case through a combination of circumstancial evidence." *Id.* Almost eight months later, plaintiffs have done neither. Their evidence has advanced no further. Accordingly, defendants are entitled to summary judgment.

It matters not that plaintiffs have recently acquired new counsel, inasmuch as no new evidence has been revealed supportive of plaintiffs' claims. New counsel only entered the case in May 1992, subsequent to an April 1992 conference at which the court gave defendant Macsil a timetable for the filing of another motion for summary judgment. Almost six months passed between the court's order in November 1991 and the filing of Macsills second motion for summary judgment. Plaintiffs have had ample time and opportunity to prosecute their case and to defend against this second round of motions. Plaintiffs are not entitled to prolong a case

indefinitely, nor the court its decision on just motions for summary judgment.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, INC., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
AVON PRODUCTS, INC., et al.	:	NO. 91-5015

ORDER

AND NOW, this 7th day of July, 1992, it is hereby ORDERED that:

1. Defendants' motions to dismiss or for summary judgment (docketed as Nos. 65, 67, and 68) are GRANTED, and summary judgment is ENTERED against plaintiffs and in favor of defendants Avon Products, Inc., Giorgio of Beverly Hills, Inc., and Macsil, Inc. Macsil, Inc.'s motion for sanctions and attorney's fees is DENIED.

2. Defendants United Guardian, Inc., and Freeman Industries, Inc., are DISMISSED pursuant to the conference held June 29, 1992, at which time the court ruled that it would enforce the settlement agreement previously entered into between plaintiffs and those defendants. The court retains jurisdiction to enforce the terms of said settlement.

3. This order having resolved the case as to all plaintiffs and defendants (defendant Marubeni, Inc., having previously been dismissed from the case), this matter is marked CLOSED.

BY THE COURT:

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J.